STATE OF MICHIGAN

COURT OF APPEALS

RITA KENDZIERSKI, BONNIE HAINES, GREG DENNIS, LOUISE BERTOLINI, JOHN BARKER, JAMES COWAN, VINCENT POWIERSKI, ROBERT STANLEY, ALAN MOROSCHAN, and GAER GUERBER, Plaintiffs-Appellees,	UNPUBLISHED September 23, 2014
v	No. 316508 Macomb Circuit Court
COUNTY OF MACOMB, Defendant-Appellant.	LC No. 10-001380-CK

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right a judgment entered in favor of the class action plaintiffs following the trial court's order granting their motion to enforce an alleged settlement agreement. We reverse and remand for further proceedings.

In March 2010, this class action lawsuit was filed on behalf of approximately 2000 retired employees of defendant, Macomb County. Plaintiffs alleged that defendant had unilaterally changed and reduced their retirement health care benefits in violation of a series of collective bargaining agreements. Plaintiffs sought to permanently enjoin defendant from implementing those changes, and future changes, to their health care benefits. Plaintiffs also sought reimbursement of out-of-pocket expenses incurred because of defendant's allegedly improper actions.

In June 2011, the parties agreed to facilitation and, on September 21, 2011, plaintiffs submitted a settlement proposal to assist the facilitation. Several facilitation meetings were held. On May 14, 2012, the trial court entered an order directing the facilitator to set a settlement figure by May 21, 2012, and directing the parties to indicate in writing whether the settlement figure was acceptable by May 29, 2012. The order also stated that: "If both parties accept the number, the case is settled. If both parties do not accept the settlement number, the matter will be scheduled for a status conference to address remaining discovery issues and to set a trial date."

On July 16, 2012, a telephone conference was conducted between the court and the parties and, according to the docket entry, a proposed consent judgment was to be exchanged by July 27, 2012. On August 13, 2012, a notice of hearing was filed by the parties for a "joint motion to preliminarily approve class action settlement, approve class notice and set date for fairness hearing." The referenced motion was not filed with the notice of hearing. According to the docket entry of August 17, 2012, the trial court dismissed the joint "motion" following a conference which included the facilitator. The trial court also entered an order for continued facilitation and directed the parties to report to the court by September 28, 2012. On November 13, 2012, an order directed that a settlement conference was scheduled for November 30, 2012, and people with settlement authority were to be present. The docket entry for November 30, 2012, indicates that the settlement conference was conducted, and the facilitator was present, but no resolution was achieved and the court was to set a pretrial scheduling order. On December 3, 2012, a scheduling order was entered setting forth dates for discovery, witness lists, case evaluation, and summary disposition motions. On December 10, 2012, plaintiffs filed a motion to compel discovery and, on January 14, 2013, the motion was granted.

On January 18, 2013, plaintiffs filed a motion to enforce an alleged class settlement agreement reached by the parties. Plaintiffs argued that the parties settled this matter by facilitation and then defendant renounced the settlement agreement. In their motion, plaintiffs set forth a chronology of events in support of their claim which we will briefly discuss here. On September 21, 2011, plaintiff submitted a settlement proposal, which was the basis of the facilitation negotiations, and defendant did not submit a proposal or counter-proposal. According to plaintiffs, on May 14, 2012, the parties met with the facilitator and it was agreed that all substantive issues identified in plaintiffs' settlement proposal were settled except for the reimbursement amount for plaintiffs' out-of-pocket expenses. Consequently, the trial court was notified of the settlement agreement, and then entered an order directing the facilitator to set a proposed settlement figure. The facilitator proposed a settlement figure and each party accepted it. Thereafter, in June 2012, plaintiffs sent defendant a proposed settlement agreement and consent judgment. On August 13, 2012, a joint notice of hearing on the parties' motion regarding the settlement was filed. According to plaintiffs, the next day defendant proposed, in writing and for the first time, fundamental and material changes to the parties' negotiated settlement agreement. In particular, defendant demanded the right to change plaintiffs' health care benefits, coverages, and providers, and also sought to expand the certified class. In October 2012, plaintiffs provided defendant with minimally revised settlement documents, accommodating one of defendant's post-settlement changes, but defendant would not sign the documents and provided no counter-proposals to plaintiffs. On November 30, 2012, defendant advised the trial court that there was no settlement because plaintiffs refused to grant defendant the right to change health care benefits in the future. Thus, on December 3, 2012, the trial court issued a scheduling order for trial.

Plaintiffs argued that the settlement agreement reached by the parties on May 14, 2012 should be enforced because the trial court's order provided that, if the parties accepted the settlement figure proposed by the facilitator, "the case is settled." The parties did, in fact, accept the settlement figure; thus, defendant was bound by the settlement agreement terms. Further, plaintiffs argued, the court was advised by the parties that the matter was settled on August 13, 2012, when the notice of hearing was filed for a joint motion to preliminarily approve the settlement.

Defendant responded to plaintiffs' motion to enforce class settlement, denying that it ever entered into a binding settlement agreement with plaintiffs. Defendant argued that none of plaintiffs' proposed settlement agreements were signed by defendant, and a settlement was not placed on the record. In fact, defendant argued, plaintiffs' proposed settlement agreements were marked "draft" and were significantly incomplete with respect to material terms. Further, the trial court held a settlement conference in November 2012, and ordered that "all parties and representatives with settlement authority must attend the conference;" thus, it was clear that the parties had not reached a "settlement" in May 2012. Moreover, in December 2012, the trial court issued a scheduling order which set forth pretrial dates—another indication that the parties had not reached a settlement agreement in May 2012. Accordingly, defendant argued, because plaintiffs could not prove the essential elements of a legal contract and could not establish that the requirements of MCR 2.507(G) were satisfied, their motion to enforce a purported settlement agreement must be denied.

Plaintiffs responded to defendant's opposition to their motion to enforce class settlement agreement, arguing that defendant advised the trial court that all material terms were settled except for the amount of damages which is what prompted the court to issue the May 14, 2012 order regarding the settlement figure. Further, plaintiffs argued, the multiple drafts of the settlement agreement merely addressed typical settlement language refinements. And the court ordered a settlement conference because, contrary to its May 14, 2012 order, a settlement document had not been submitted to the court. In short, plaintiffs argued, a settlement was reached during facilitation which resulted in the trial court issuing an order directing the parties to resolve the only remaining issue, that of damages.

On March 8, 2013, the trial court entered an opinion and order granting plaintiffs' motion to enforce class settlement agreement. The court held that two separate writings evidenced the parties' settlement and satisfied the requirements of MCR 2.507(G). The first writing was defendant's May 29, 2012 signed written acceptance of the facilitator's proposed settlement figure. Although the court noted that the letter appeared only to resolve the issue of money damages, it held that the letter must be considered in the context that it followed the court's May 14, 2012 order which directed that, "[i]f both parties accept the number, the case is settled." The trial court noted that it only issued the May 14, 2012 order "because the parties agreed – in open court – that all material terms of their dispute had been resolved apart from money damages." Further, the court noted, defendant "gave every indication of agreeing with the Court's statement that the case would be settled so long as the parties could agree on a settlement amount." Accordingly, the court concluded, considered in context, defendant's May 29, 2012 letter constituted clear and unambiguous evidence of the agreement as required by MCR 2.507(G). The court held that the second writing that satisfied the requirements of MCR 2.507(G) was the August 13, 2012 notice of hearing for the parties' joint motion to preliminarily approve the class action settlement. The court concluded that "this document clearly indicates that the parties had reached a settlement and were seeking approval of their settlement by the Court." The trial court also considered the various settlement proposals submitted by plaintiffs and concluded, in part: "The changes which were made between the time of the initial settlement proposal of September 26, 2011 and the final October 26, 2012 draft are minimal." The trial court also held "that the October 26, 2012 draft accurately sets forth both the material terms of the parties' settlement and all ancillary and/or immaterial terms. . . . [and] accurately memorializes the parties' existing

settlement agreement in writing." Accordingly, plaintiffs' motion to enforce class settlement was granted.

Defendant filed a motion for reconsideration of the order, arguing that: (1) there was no written settlement agreement signed by defendant; (2) defendant did not agree to the settlement terms on the record "in open court" as required by MCR 2.507(G); (3) the notice of hearing relied upon by the trial court was subsequently dismissed and the referenced motion was never filed; (4) the actions and statements by the parties, the facilitator, and the trial court conclusively demonstrated that there was never a meeting of the minds on all material terms of a settlement agreement; (5) all of plaintiffs' proposed settlement agreements clearly stated that they were "drafts;" and (6) several letters were exchanged between the parties documenting disagreement on material terms. Defendant also filed a motion to amend, correct, and/or for relief from the May 14, 2012 order, which raised the same or similar arguments set forth in its motion for reconsideration.

On May 13, 2013, the trial court entered an opinion and order denying defendant's motion for reconsideration and motion to amend, correct, and/or grant relief from the May 14, 2012 order. The trial court concluded that defendant did not demonstrate that the court was misled, that a different result would occur from correction of an error, or that there was a mistake or error in the entry of that order. The court held that its May 14, 2012 order "accurately reflects the parties' representations to this Court. To wit, the parties clearly and unambiguously represented to this Court that, if they could agree on a settlement figure, the case would be settled." On May 28, 2013, a judgment was entered which, in part, incorporated "the October 26, 2012 Settlement Agreement (SA) between Plaintiff Class and the County of Macomb . . . ." Defendant's appeal to this Court followed.

Defendant argues that a settlement agreement did not exist because there was no meeting of the minds on all of the material terms and, even if the trial court concluded that there was a valid contract, the agreement could not be enforced because the requirements of MCR 2.507(G) were not satisfied, i.e., it was not made in open court and was not signed by defendant. We agree with both arguments.

Questions of law, including whether a contract exists, as well as the interpretation and application of a court rule, are reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

An agreement to settle a lawsuit is a contract governed by the rules of contract construction and interpretation. *Id*. To form a valid contract, there must be an offer, an acceptance, and mutual assent on all the essential terms. *Id*. at 452-453. However, even if a valid contract exists, an agreement to settle a pending litigation must comply with MCR

2.507(G) to be enforceable.[1] *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001). MCR 2.507(G) provided:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

This rule has been characterized as "a court rule version of a statute of frauds governing legal proceedings." *Brunet v Decorative Engineering, Inc*, 215 Mich App 430, 435; 546 NW2d 641 (1996), quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 125.

In this case, neither a valid nor enforceable settlement agreement existed. After the facilitation order was entered, plaintiffs submitted an initial settlement proposal dated September 21, 2011. This proposal addressed numerous material terms including, for example, acceptable insurance providers, prescription drug and health care benefits, as well as deductibles and copays. Plaintiffs' proposal also addressed the issue of damages for past and future out-of-pocket costs as a consequence of prescription drug and health care benefit changes. There is no record evidence of any response by defendant to plaintiffs' initial settlement proposal.

Plaintiffs claimed, however, that at a facilitation hearing held on May 14, 2012, the parties reached a settlement agreement on all of the disputed issues except for the amount of damages. But there is no record evidence to support plaintiffs' claim that the parties reached a settlement agreement. There is no evidence of an offer, an acceptance of the offer, or of mutual agreement on all of the purported contract's essential terms. "A contract is made when both parties have executed or accepted it, and not before." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). There is neither a written agreement signed by the parties nor evidence of a verbal agreement. In granting plaintiffs' motion to enforce class settlement agreement, the trial court held that it issued the order directing the facilitator to determine the amount of damages "because the parties agreed – in open court – that all material terms of their dispute had been resolved apart from money damages." However, the parties did not agree "in open court" that the dispute was resolved.

In *Groulx v Carlson*, 176 Mich App 484; 440 NW2d 644 (1989), this Court concluded that "the hallmark of a proceeding which may be described as constituting an 'open court' session" is "the formality of recorded court business." *Id*. at 489-490. In that case, although a settlement agreement was reached in chambers, it was enforceable because "the agreement was read aloud by the parties' attorneys in the presence of the trial judge, the court clerk, and the court reporter, all of whom had formally convened for court business." *Id*. at 489. To the contrary, in this case, "the formality of recorded court business" is completely lacking. There was no formal court proceeding, presided over by the judge, at which time the purported agreement was placed on the record. In *Fear v Rogers*, 207 Mich App 642, 644-645; 526 NW2d

[1] MCR 2.507(G) was subsequently amended to MCR 2.507(F), but the language of the rule did not change.

197 (1994), this Court specifically held that an agreement reached in a settlement conference, that was not placed on the record or reduced to writing, was unenforceable. And, while the trial court appears to claim awareness of a settlement agreement, the court never indicated that it knew the precise terms of any such agreement but, in any case, awareness of an agreement is insufficient to satisfy the plain requirements of MCR 2.507(G). See *Jorgensen v Howland*, 325 Mich 440, 446-447; 38 NW2d 906 (1949). Because the settlement offer and acceptance were not made in open court, and there was no writing subscribed by defendant or its attorney, the alleged settlement agreement was not enforceable. See *Metropolitan Life Ins Co v Goolsby*, 165 Mich App 126, 128-129; 418 NW2d 700 (1987).

Further, the fact that defendant's attorney signed a letter accepting the facilitator's proposed settlement amount on the issue of damages, alone, is insufficient to establish that a valid, enforceable settlement agreement existed. Plaintiffs sought to settle all of the numerous issues raised in this class action through a consent judgment, not just their damages claim. But there is no way to determine whether defendant, in fact, consented to settle all of the issues in this dispute or the precise terms of any such agreement. See *Howard v Howard*, 134 Mich App 391, 397; 352 NW2d 280 (1984). There is no evidence of a meeting of the minds on *all* the essential terms of a settlement agreement. See *Kloian*, 273 Mich App at 453.

In support of its conclusion that the parties reached a settlement in May 2012, the trial court also referenced an August 13, 2012 notice of hearing for the parties' joint motion to preliminarily approve the class action settlement. However, a notice of hearing, alone, is neither evidence of an agreement nor "evidence of *the* agreement" to settle the dispute between the parties as required under MCR 2.507(G). The trial court also compared plaintiffs' various settlement proposals and concluded that the parties' reached a settlement that did not differ in material respect from plaintiffs' initial settlement proposal of September 21, 2011. However, even if plaintiffs' settlement proposal of September 21, 2011 may be construed as an "offer," there is no evidence of defendant's acceptance of the offer. For example, defendant did not sign the proposal and there is no letter signed by defendant or its counsel which indicated acceptance of plaintiffs' proposal. See *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). Accordingly, we reject the trial court's analysis and conclusion in this regard.

In summary, it is well-settled that a court cannot force parties to settle lawsuits, *Henry v Prusak*, 229 Mich App 162, 170; 582 NW2d 193 (1998), and a court cannot make a contract for the parties where there is no contract, *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). In this case, we conclude that plaintiffs failed to establish that a valid contract to settle this dispute existed. See *Kamalnath*, 194 Mich App at 549 (citation omitted). "Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract." *Id*. But even if a valid oral contract to settle this dispute resulted during a facilitation hearing on May 14, 2012, it was not enforceable because the agreement was not made in open court and written evidence of the agreement to settle the entire case, subscribed by defendant or its attorney, does not exist. See MCR 2.507(G); *Michigan Mut Ins Co*, 247 Mich App at 484-485.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot